UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

UPS SUPPLY CHAIN SOLUTIONS, INC. Respondent, and UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, IBT Charging Party	CASE NO. 12–CA–159257 12–CA–168819

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT OF EXCEPTIONS

TO THE HONORABLE LABOR RELATIONS BOARD:

COMES NOW UPS Supply Chain Solutions, Inc. (the "Company", “Employer” or "Respondent"), through its undersigned attorneys, and very respectfully submits these Exceptions and Brief in support of Exceptions to support its contention that it has not engaged in unfair labor practices in violation of the National Labor Relations Act (the "Act"). The ALJ correctly dismissed case 12-CA-159257. We respectfully request that, in addition, case 12-CA-168819 must also be dismissed.

I. PROCEDURAL BACKGROUND

The consolidated complaints allege that UPS Supply Chain Solutions, Inc. violated Section 8(a)(5) and (1) of the National Labor Relations Act by: (1) unlawfully insisting as a condition of reaching an initial collective bargaining agreement (CBA) with the Union de Tronquistas De Puerto Rico, Local 901 (“the Union”), that the Union submit its collective-bargaining proposals in English and (2) failing and refusing, since

August 6, 2015 to meet and collectively bargain with the Union for an initial Collective Bargaining Agreement.

The Union filed a charge in Case 12–CA–159257 on September 2, 2015. That charge alleged that, since "about June 2015," UPS has bargained in bad faith with the Union by conditioning continued negotiations for an initial CBA on the Union's translation of its proposal from Spanish into English. The Board issued the initial complaint in 12–CA–159257 on December 30, 2015.

On February 1, 2016, the Union filed charge 12–CA–168819 alleging that the Company had failed to bargain in good faith since January 2016, by refusing to meet and bargain. On February 19, the Union filed an amended charge in the case alleging that, since August 1, the Company has been refusing to meet and bargain with the Union for the purpose of negotiating because of a pending case before the NLRB. The Board issued a complaint in Case 12–CA–168819 on February 23, 2016.

On March 2, 2016, the Regional Director issued an order consolidating Cases 12–CA–159257 and 168819 for hearing. A hearing was held on March 8, 2016.

The Administrative Law Judge ("ALJ"), Honorable Michael Rosas, issued his decision on April 13, 2016. The ALJ found that the Company had not violated the Act by insisting that the Union submit its collective-bargaining proposals in the English language. The ALJ correctly held that the translation issue involved a mandatory subject of bargaining over which the Company had attempted to bargain in good faith with the Union. Thus, the ALJ dismissed the claim in Case 12–CA–159257.

However, the ALJ held that the Company had failed and refused to bargain in good faith with the Union as the exclusive collective bargaining representative of the

Unit in violation of Section 8(a) (5) and (1) of the Act by (1) on or about December 10, 2015, failing and refusing to schedule bargaining sessions until February 24, 2016; and (2) on February 23, 2016, canceling a bargaining session scheduled for February 24, 2016 and not agreeing to schedule another session until March 22 or 23, 2016.

The Employer contends that it has not violated the Act by refusing to bargain or by bargaining in bad faith with the Union. The Employer asserts that the ALJ incorrectly applied the well-established Board precedent in cases involving the duty to bargain in good faith. In determining whether a party has violated its statutory obligation to bargain in good faith, the Board must examines **the totality of the party's conduct**, both at and away from the bargaining table. **In this case, the Administrative Law Judge has examined the evidence in a piecemeal manner to reach his conclusion that the Employer has violated the Act.**

For these reasons the Employer makes the following Exemptions:

II. EXCEPTIONS

1. ALJD, p. 6, lines 28-37 and Footnote 24. The ALJ's finding that Attorney Silva Cofresí had incorrectly concluded that there was misunderstanding between the parties about whether or not to delay negotiations while Board charges were pending because Carrillo had never agreed to freeze negotiations.
2. ALJD, p. 12, lines 43-45. The ALJ's conclusion that on December 10, 2015 Attorney Silva Cofresí began a pattern of delaying tactics in scheduling bargaining meetings with the Union.

3. ALJD, p. 13, lines 6-9. The ALJ's unsupported assertion that when contacted by Carrillo in late January 2016, Attorney Silva Cofresí had *falsely* represented that the parties agreed to freeze bargaining due to the pending Board case.

4. ALJD, p. 13, lines 18-20. The ALJ's conclusion that the totality of the Company's conduct from December 10, 2015, caused delays in bargaining through March 2016, in violation of Section 8(a)(5) and (1) of the Act.

III. LEGAL BACKGROUND

The Act requires Employers to bargain collectively with the representative of its employees and defines such bargaining as the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

Sections 8(a)(5) and 8(b)(3) of the Act make it an unfair labor practice for an employer and union representative, respectively, "to refuse to bargain collectively." 29 U. S. C. §§ 158(a)(5) and 158(b)(3). Section 8(d), added, as was § 8(b)(3), to the Act by the Labor Management Relations Act, 1947, 61 Stat. 136, defines the duty to bargain as:

> 'to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession'
>
> 29 U. S. C. § 158(d).

The duty to negotiate in good faith mandated by Section 8(b)(3) and 8(d) of the Act requires both parties to bargain with a "serious intent to adjust differences and to reach an acceptable common ground". NLRB V. Truitt Mfg, 351 U.S. 149, 155, 100 L. Ed. 1027, 76 S. Ct. 753 (1956). The duty to bargain in good faith requires both parties "to participate actively in the deliberations so as to indicate a present intention to find a basis for an agreement". NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943), Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984) (quoting NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960). Both parties are thus required to have "an open mind and a sincere desire to reach an agreement". NLRB v. Truitt Mfg. Co., supra. Furthermore, the employer and the Union are required to make "a sincere effort… to reach a common ground." NLRB v. Montgomery Ward & Co., supra.

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines **the totality of the party's conduct**, both at and away from the bargaining table. Public Service Co. of Oklahoma (PSO), 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); Overnite Transportation Co., 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); Atlanta Hilton & Tower, supra, at 1603. From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. PSO, supra, 334 NLRB at 487. "The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct." Reichhold Chemicals, 288 NLRB 69, 69 (1988), enf. denied in

part on other grounds 906 F.2d 719 (D.C. Cir. 1990); Flying Foods, 345 NLRB No. 10, slip op. at 7 (2005).

IV. ARGUMENT

Here the ALJ has not correctly applied Board precedent and standards to the facts of the case. Instead of looking at the totality of the conduct of both parties, the ALJ does a piecemeal analysis of the facts, disregarding the Union's conduct throughout the negotiations. In fact, the ALJ ignores his own conclusion that the Employer did not violate the Act by insisting that the Union's proposal be translated into English. If, as the ALJ found, the Employer acted correctly and attempted to bargain in good faith with the Union regarding the translation issue, then it must follow **that the Union's refusal to bargain with the Company on the issue must be illegal, and evidence of bad faith bargaining on the part of the Union**. The ALJ found that the translation question involved a mandatory subject of bargaining over which the Company had attempted in good faith to reach an agreement with the Union by offering to pay half the cost of translating the Union's initial proposal. Thus, it is evident that the Union did not bargain in good faith by insisting on not translating the proposals and not making any counterproposals to the Company's offer to split the cost of the translation. Instead, the Union filed an Unfair Labor Practice Charge against the Company in which they eventually, through letter dated November 20, 2015 (Joint Exhibit 11), based the fact that the negotiations had been delayed.[1] The Union's whole behavior regarding the

[1] In Joint exhibit 11, Union representative Argenis Carrillo states, referring to the translation of the proposal that *"I remind you the latter is under consideration by the Federal Board and is the only reason why the negotiation has been delayed"*. This constitutes a clear admission on part of the Union that they agreed to delay the negotiations because the proposal translation issue was under consideration of the NLRB.

translation issue shows a complete lack of an open mind and no sincere desire to reach an agreement with the Company. See NLRB v. Truitt Mfg. Co., supra. **We must note that the Union made an outright rejection of the Company's offer to pay half the cost of translating its proposal and did not engage in bargaining with the Company regarding this offer**. In fact, the Union used the Board unfair labor practice proceedings against the Employer, trying to impose its position regarding the translation and then specifically blaming any delay in negotiations to its filing of said charge.

In addition to the Union's refusal to bargain regarding the translation of its proposal, the Union adopted a dilatory attitude during the negotiations. The evidence clearly shows that the Company never refused to meet with the Union or refused to bargain in good faith. The testimony of Union Representative Argenis Carrillo, the sole witness presented by the General Counsel, clearly showed that **most of the delays during the bargaining process were caused by the Union, not the Company**.

Right from the beginning, the Union showed a slack and dilatory attitude regarding collective bargaining negotiations. The Union was certified as the bargaining representative of the UPS Supply Chain Solutions' employees in the bargaining unit at issue on July 28, 2014. (Tr. page 14)

The Union waited for almost **five months** to request dates for beginning negotiations, through a letter dated December 16, 2014. The letter also stated that the Union would be forwarding its proposals "promptly". (Joint Exhibit 1)

The Union sent the Company its bargaining proposal on February 18, 2015, through a letter from Union Representative Argenis Carrillo, (Joint Exhibit 3). This

shows that after being certified as bargaining representative, the Union took **seven months** to send the Company its first bargaining proposal. (Tr. Page 45).

Furthermore, on several occasions the Union did not respond to Company invitations to bargain.

For example, on August 7, 2015 (Letter of Attorney Silva-Cofresi, Joint Exhibit 9) the Company invited the Union to continue with the negotiations “as soon as possible." In his testimony, Carrillo admitted that the Union never answered the letter inviting the Union to negotiate. (Tr. Page 63). Instead, on August 17, 2015, the Union filed an Unfair Labor Practice charge against the Company, which it later withdrew. Carrillo admitted during the hearing that after being invited by Attorney Silva to continue with the negotiations as soon as possible, **the Union never responded and did not communicate with the Company from August through November, 2015** (Tr. Pages 64-65). This shows that after filing the unfair practice charge against the Company on August 2015, the Union literally disappeared for several months and did not propose or request any dates for negotiations.

Despite the Union’s lack of response, on November 19, 2015, the Company wrote Carrillo and again invited the Union to continue the collective bargaining negotiations. (Joint Exhibit Number 10). The Company reiterated again its desire to continue the negotiations and exhorted Carrillo to get in touch as soon as possible to coordinate new dates for bargaining. **So it was the Union and not the Company which refused to bargain collectively for over four months**. And it was the Company and not the Union, the party that reached out and tried to restart the negotiations.

Carrillo responded to the Company on November 20, 2015 (Joint Exhibit 11) stating that he was available for bargaining but claiming to be confused as to the Company's intentions. He inquired whether the Company had altered its position regarding its request that the Union's proposal be translated into English. It is very clear that the Union persisted in its refusal to bargain with the Company regarding the translation of the Union's proposal. Carrillo reminded the Company that the Union had filed a charge with the Board which was under consideration and stated that "**this was the only reason that the negotiations had been delayed"**. Again, this is a clear admission by the Union that the delays in negotiations were not caused by the Company, but by the Union's filing of a charge before the NLRB and its insistence on not negotiating about the translation of its proposal. The ALJ interprets this statement, as well as Carrillo's testimony, to mean that the Union never agreed to freeze the negotiations during the pendency of the unfair labor practice charge. However, the question is not whether the Union had agreed to freeze the negotiations. The relevant question is whether in view of these facts, the Company could have reasonably concluded that the Union did not wish to pursue negotiations until the issue was resolved. The ALJ's conclusion that attorney Silva Cofresí *"falsely"* represented that the parties agreed to freeze the negotiations because of the pending Board charges is contrary to the record because:

(1) The Union's own admission through letter dated November 20, 2015 (Joint Exhibit 11) that the Board ULP charge procedure "**was the only reason that the negotiations had been delayed"** shows that the Union persisted in its position of refusing to bargain in good faith with the Employer regarding

translating the Union proposal until the resolution of the Board charge. The Union clearly wished to obtain through the Board proceedings what it could not obtain through negotiations;

(2) Through letter dated January 27, 2016 Mr. Silva told Mr. Carrillo that the last time they spoke they agreed to wait on the result of the Board case to resume negotiations. **This letter was never answered by the Union (see TR, page 66 and 67).**

(3) On February 23, 2016, after a misunderstanding regarding a meeting, the Company invited the Union to bargain on two days, March 22 and 23, 2016. (Joint Exhibits 19-20). During the hearing, Carrillo admitted that as of that date, March 8, 2016, the Union had not responded to the Company's invitation to bargain on March 22 and 23, 2016. (Tr. p. 67)

The totality of the circumstances show that it was reasonable for attorney Silva Cofresí to believe that the Union's intentions were to wait until the resolution of the pending NLRB charge to resume negotiations. In any event, the record shows that the employer cancelled one single meeting, the one scheduled for February 23, 2016, and immediately proposed negotiations on two consecutive days, even when the Union was refusing to translate its proposal. In light of the totality of the circumstances, it is not reasonable to conclude that it was the employer the one who engaged in dilatory tactics.

In considering the bargaining history between the parties, the Honorable Administrative Law Judge reviewed the Company's actions between mid-December, 2015 and February, 2016 **in complete isolation** from all the events that had taken

place between the parties before and after that date and without examining the Union's activities during negotiations. The ALJ has focused on a few isolated incidents of alleged Company delays in scheduling meetings with complete disregard of the Union's continued delays and obstinate refusal to bargain in good faith regarding the translation issue and explicit admission that the negations had been delayed due to the filing of the charge.

The totality of the bargaining history between the parties shows that the Company has always been willing to compromise and meet the Union half way and has therefore fulfilled the statutory requirement to bargain in good faith with the Union.

V. CONCLUSION

The Company respectfully contends that it has shown that the ALJ erred in his findings of fact and law in case 12-CA-168819. The evidence on record shows that the General Counsel did not meet the burden of proof in any of the alleged violations of the Act discussed above.

In the present case, it was the Union who refused to bargain in good faith with the Company about the requested translation and then engaged in a pattern of delays of the negotiations. Any purported misunderstanding regarding the suspension of a single negotiation meeting on February 2016 does not rise to the level of bad faith bargaining on the part of the employer considering the totality of the conduct by both parties during the negotiations.

WHEREFORE, it is respectfully requested that the Honorable Board determine that the ALJ's rulings, findings and conclusions included in the listed Exceptions are not supported by the evidence, are contrary to Board precedent and should be reversed.

The ALJ correctly dismissed case 12-CA-159257. In addition, case 12-CA-168819 must also be dismissed.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, this 11th day of May, 2016.

CERTIFICATION:

We hereby certify that on this same date, a true and exact copy of this document was sent by certified mail, return receipt requested, to Mr. Argenis Carillo, Union Representative, Unión de Tronquistas de PR, Local 901 IBT, 352 Calle del Parque, San Juan, PR 00912-3702.

RESPECTFULLY SUBMITTED.

FIDDLER GONZALEZ & RODRIGUEZ
PO BOX 363507
San Juan, Puerto Rico 00936-3507
Tel. 787 759-3198 / 787-759-3261
Fax: 787-250-7565 / 787-250-7555
E-Mail: jsilva@fgrlaw.com
E-Mail: afiguero@fgrlaw.com

S/José A. Silva Cofresí
José A. Silva Cofresí, Esq.
T.S.P.R. #5,774

S/Alicia Figueroa Llinás
Alicia Figueroa Llinás, Esq.
T.S.P.R. #10,676

100357
827-1157